

AN ORDINANCE 2012-08-30-0658

AUTHORIZING A PROFESSIONAL SERVICES AGREEMENT BETWEEN THE CITY OF SAN ANTONIO, TEXAS AND MIKYOUNG KIM DESIGN, LLC FOR THE HEMISFAIR PARK PUBLIC ART MASTER PLAN IN AN AMOUNT NOT TO EXCEED \$88,500.00, A 2007 BOND PROGRAM SAVING FUNDED PROJECT LOCATED IN CITY COUNCIL DISTRICT 1.

* * * * *

WHEREAS, the City of San Antonio in coordination with the HemisFair Park Area Redevelopment Corporation issued a Request for Qualification for the development of a Public Art Master Plan for HemisFair Park; and

WHEREAS, the response from Mikyoung Kim Design, LLC has been reviewed and recommended for selection and approved by the San Antonio Public Art Board; and

WHEREAS, City Council finds that it is in the best interest of the City, its residents and visitors to have a public art master plan that will enhance and enliven HemisFair Park through design;
NOW, THEREFORE:

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. The City of San Antonio hereby approves and authorizes a Professional Services Agreement with Mikyoung Kim Design, LLC, for up to \$88,500.00, a copy of which is attached to this ordinance as **Exhibit 1**.

SECTION 2. Payment in the amount not to exceed \$88,500.00 in SAP Fund 45099000, General Obligation Capital Projects, SAP Project Definition 40-00263, HemisFair Park Street Improvements, is authorized to be encumbered and made payable to Mikyoung Kim Design, LLC for professional services.

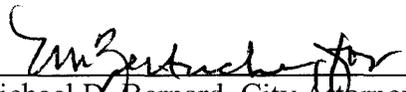
SECTION 3. The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance, may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

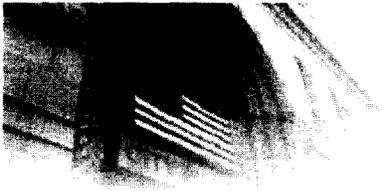
SECTION 4. This Ordinance shall be effective immediately upon passage by eight affirmative votes; otherwise, it shall be effective on the tenth day after passage.

PASSED AND APPROVED on this 30th day of August, 2012.


M A I O R
Julián Castro

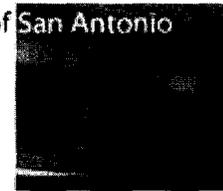
ATTEST: 
Leticia M. Yacek, City Clerk

APPROVED AS TO FORM: 
Michael D. Bernard, City Attorney



Request for
COUNCIL
ACTION

City of San Antonio



Agenda Voting Results - 23

Name:	4, 6, 7, 8A, 8B, 8C, 9, 10, 13, 16, 19, 20A, 20B, 20C, 20D, 20E, 22, 23, 24, 26, 27, 28, 29						
Date:	08/30/2012						
Time:	09:27:22 AM						
Vote Type:	Motion to Approve						
Description:	An Ordinance authorizing the execution of a Professional Services Agreement for an amount up to \$88,500.00 with Mikyoung Kim Design, LLC for the development of a public art master plan for Hemisfair Park, a 2007 Bond Program Savings funded project, located in Council District 1. [Pat DiGiovanni, Deputy City Manager; Mike Frisbie, Director, Capital Improvements Management Services]						
Result:	Passed						
Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Julián Castro	Mayor		x				
Diego Bernal	District 1		x				
Ivy R. Taylor	District 2		x				
Leticia Ozuna	District 3		x				
Rey Saldaña	District 4		x				
David Medina Jr.	District 5		x				
Ray Lopez	District 6		x				x
Cris Medina	District 7		x			x	
W. Reed Williams	District 8	x					
Elisa Chan	District 9		x				
Carlton Soules	District 10		x				

EXHIBIT 1

**PROFESSIONAL SERVICES AGREEMENT
FOR HEMISFAIR PARK PUBLIC ART MASTER PLAN**

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

This Agreement is entered into by and between the City of San Antonio, a Texas Municipal Corporation (hereinafter “City”) acting by and through its City Manager, pursuant to Ordinance No. _____ passed and approved on the 30th day of August, 2012 and Mikyoung Kim Design, LLC (hereinafter “Consultant”), both of which may be referred to collectively as the “Parties”.

The Parties severally and collectively agree, and by the execution hereof are bound, to the mutual obligations herein contained and to the performance and accomplishment of the tasks hereinafter described.

I. DEFINITIONS

As used in this Agreement, the following terms shall have meanings as set out below:

1.1 “City” is defined in the preamble of this Agreement and includes its successors and assigns.

1.2 “Consultant” is defined in the preamble of this Agreement and includes its successors.

1.3 “Director” shall mean the Executive Director of the City’s Office of Cultural Affairs.

1.4 “Hemisfair” shall mean the physical area known as Hemisfair Park and all public improvements, buildings and structures located within the 104_ acre area bounded by Alamo Street on the west, Market Street on the north, Chavez Boulevard on the south, and the I-37 corridor on the east.

1.5 “HPARC” shall mean the Hemisfair Park Area Redevelopment Corporation.

II. TERM

2.1 Unless sooner terminated in accordance with the provisions of this Agreement, the term of this Agreement shall commence upon execution and terminate on September 30, 2013 or upon completion, whichever is sooner.

III. SCOPE OF SERVICES

3.1 Consultant agrees to provide services to develop the City of San Antonio's Hemisfair Public Art Master Plan ("Master Plan") described in this Article III Scope of Services (referred to as the "Project") in exchange for the compensation described in Article IV Compensation to Consultant.

3.2 Consultant shall provide the following basic services and activities:

3.2.1 Initial City Staff and Team Meeting, Guidelines and Process Development. Participate and engage in the kickoff meeting with OCA staff, HPARC, standing committees, stakeholder development, gathering of materials such as master plans, budgets, policies, neighborhood plans, ordinances, etc. as needed for the Project. This phase will establish the planning process and timeline, including guidelines to be used for the duration of the Project.

3.2.2 Research. Conduct extensive research into HemisFair's past and present uses and functions including but not limited to review of all applicable documents, plans, policies, and guidelines related to the redevelopment of Hemisfair. Additionally, Consultant shall research the City of San Antonio public art program and current public arts programming, as well as the City's Capital Improvement Program and Bond program.

3.2.3 Interviews, Meetings and Presentations. Key Person Interviews – Interviews will be conducted with key stakeholders, including but not limited to arts leaders, city officials and staff, HPARC board members, business and community leaders, consultants (if applicable), and others to be determined.

3.2.4 Analysis and Program Design. Information gathered by team members will be shared and analyzed, and a conceptual framework for the Master Plan will be developed. Specific opportunities and barriers will be identified. Procedures including operating, artist selection, art acquisition, public safety, insurance, funding, maintenance, conservation, public relations, and education will be reviewed and recommendations will be made. A process for reviewing potential public art sites will be developed and various recommendations will be delineated.

3.2.5 Writing. A draft public art master plan will be made available to the City of San Antonio and others as necessary, for review, discussions and revision. The draft will include an executive summary with specific goals and objectives, and an action plan for implementation that is categorized into immediate, short-term, and long-term projects within a historical context. The final Master Plan will be delivered as camera-ready art for printing on a CD as well as in HTML format. A hard copy and digital copy on CD of the Master Plan will be submitted as a final product.

3.2.6 Reporting. Consultant will conduct several coordination meetings with City staff and HPARC - at Project initiation, during the course of the Project, and when the draft report is presented for review, discussion and revision. Progress reports will be submitted on a monthly basis, or as needed. Final Master Plan presentations will be given to the Public Art Committee, the public and the City Council.

3.2.7 Site Visits. Conduct up to six site visits in order to complete the above-listed tasks

3.2.8 Consultant shall provide all the above-listed services as more specifically detailed in the Performance Schedule, which is attached and incorporated herein as Exhibit I, to the extent that it does not conflict with the terms of this Agreement.

3.2.9 INTERNET-BASED PROJECT MANAGEMENT SYSTEMS. At its option, City may manage the Project through an Internet-based management system. In such cases, Consultant shall conduct communication through this media and perform all Project related functions utilizing this database system. This includes correspondence, submittals, requests for information, vouchers, or payment requests and processing, Amendments, Change Orders and other administrative activities.

3.3 The City shall provide the following services:

3.3.1 Assist the Consultant by collecting and providing all necessary materials to the Consultant (i.e. existing policies, procedures, ordinances, regulations, master plans, and other available information pertaining to the project) without cost to the Consultant; and

3.3.2 Staff and/or arrange meetings and consultations as needed for the Consultant to fulfill all of the Consultant's obligations under this Agreement; and,

3.3.3 Identify and provide a list of individuals and groups that should be included in the planning process with contact information, including city employees, officials, key business people, and various community stakeholders; and,

3.3.4 Give prompt written notice to Consultant whenever the City observes or otherwise becomes aware of any development that affects the scope or timing of Consultant services or the development of Hemisphere; and

3.3.5 When an Internet-based management system is used, the City shall administer the software, provide training to Consultant and Consultant's personnel, and make the software accessible via the Internet to Consultant and Consultant's personnel.

3.4 All work performed by Consultant hereunder shall be performed to the satisfaction of Director of City's Office of Cultural Affairs. The determination made by Director shall be final, binding and conclusive on all Parties. City shall be under no obligation to pay for any work performed by Consultant, which is not satisfactory to Director. City shall have the right to terminate this Agreement, in accordance with Article VII. Termination, in whole or in part, should Consultant's work not be satisfactory to Director; however, City shall have no obligation to terminate and may withhold payment for any unsatisfactory work, should City elect not to terminate.

IV. COMPENSATION TO CONSULTANT

4.1 Total Compensation. In consideration of Consultant's performance in a satisfactory and efficient manner, as determined solely by the Director, of all Project services and deliverables set forth in this Agreement, City agrees to pay Consultant up to \$88,500.00 as total basic services compensation, to be paid to Consultant upon the receipt and approval of invoices by City.

Phase	Compensation Each Phase
Phase I. Upon execution of Contract	\$6,000.00
Phase II. Research & Initial Meetings	\$10,000.00
Phase III. 50% Design/Development	\$22,000.00
Phase IV. 100% Design Development	\$21,500.00
Phase V. Final Master Plan	\$19,000.00
Phase VI. Final Presentations and Product	\$10,000.00
Total Compensation	\$88,500.00

4.2 Travel Expenses. All travel expenses and fees (including coach class airfare, standard size car rental, business grade lodging, parking and per diem meals) that pertain to the delivery of Project services and deliverables in the Agreement are included in the Total Compensation listed in Section 4.1 above. Consultant is responsible for tracking their own travel expenses and meeting responsibilities and duties required by this Agreement including attendance at meetings and presentations. City may request a report detailing expenditures with Request for Payment. City does not reimburse for alcohol.

4.3 Compensation for all basic services fees and travel expenses will be on a task basis according to the Phases described in 4.1 above. City shall make payments to Consultant, subject to IV. Compensation to Consultant, in the amounts due under this Agreement within 30 business days of the receipt of Request for Payment.

4.4 Should there be discrepancies in the Request for Payment or if more information is required, Consultant will have 30 days upon notice by City to correct any discrepancies or submit additional information requested by City. Failure to timely submit the additional information requested by the City may result in disallowance of the Consultant's requested compensation.

4.5 No additional fees or expenses of Consultant shall be charged by Consultant nor be payable by City. The Parties agree that all compensable expenses of Consultant have been provided for in the total payment to Consultant as specified in section 4.1 above. Total payments to Consultant cannot exceed that amount set forth in section 4.1 above, without prior approval and agreement of all Parties, evidenced in writing and in accordance with Article XIV. Amendments.

4.6 Final acceptance of work products and services require written approval by City through the Director. Final payment will be made to Consultant following written approval of the final work products and services by Director. City shall not be obligated or liable under this Agreement to any party, other than Consultant, for the payment of any monies or the provision of any goods or services.

V. OWNERSHIP OF DOCUMENTS

5.1 Any and all writings, documents or information in whatsoever form and character produced by Consultant pursuant to the provisions of this Agreement shall be the exclusive property of City upon payment for services rendered; and no such writing, document or information shall be the subject of any copyright or proprietary claim by Consultant.

5.2 Consultant understands and acknowledges that as the exclusive owner of any and all such writings, documents and information, City has the right to use all such writings, documents and information as City desires, without restriction,

VI. RECORDS RETENTION

6.1 Consultant and its subcontractors, if any, shall properly, accurately and completely maintain all documents, papers, and records, and other evidence pertaining to the services rendered hereunder (hereafter referred to as "documents"), and shall make such materials available to the City at their respective offices, at all reasonable times and as often as City may deem necessary during the Agreement period, including any extension or renewal hereof, and the record retention period established herein, for purposes of audit, inspection, examination, and making excerpts or copies of same by City and any of its authorized representatives.

6.2 Consultant shall retain any and all documents produced as a result of services provided hereunder for a period of four years (hereafter referred to as "retention period") from the date of termination of the Agreement. If, at the end of the retention period, there is litigation or other questions arising from, involving or concerning this documentation or the services provided hereunder, Consultant shall retain the records until the resolution of such litigation or other such questions. Consultant acknowledges and agrees that City shall have access to any and all such documents at any and all times, as deemed necessary by City, during said retention period. City may, at its election, require Consultant to return said documents to City prior to or at the conclusion of said retention.

6.3 Consultant shall notify City, immediately, in the event Consultant receives any requests for information from a third party, which pertain to the documentation and records referenced herein. Consultant understands and agrees that City will process and handle all such requests.

VII. TERMINATION

7.1 For purposes of this Agreement, "termination" of this Agreement shall mean termination by expiration of the Agreement term as stated in Article II. Term, or earlier termination pursuant to any of the following provisions.

7.2 Termination Without Cause. This Agreement may be terminated by either party upon 10 calendar days written notice, which notice shall be provided in accordance with Article VIII Notice.

7.3 Termination For Cause. Upon written notice, provided in accordance with Article VIII. Notice, City may terminate this Agreement as of the date provided in the notice, in whole or in part, upon the occurrence of one or more of the following events, each of which is an Event for Cause under this Agreement including but not limited to: 7.3.1 the sale, transfer, pledge, conveyance or assignment of this Agreement without prior approval, as provided in Article XII. Assignment and Subcontracting; or

7.3.2 Bankruptcy or selling substantially all of company's assets.

7.4 Defaults With Opportunity for Cure. Should Consultant default in the performance of this Agreement in a manner stated in this section 7.4 below, City shall deliver written notice specifying such default. Consultant shall have 30 calendar days after receipt of the written notice, in accordance with Article VIII. Notice, to cure such default. If Contractor fails to cure the default within such 30-day cure period, City shall have the right, without further notice, to terminate this Agreement in whole or in part as City deems appropriate, and to contract with another contractor to complete the work required in this Agreement. City shall also have the right to offset the cost of said new Agreement with a new consultant against Consultant's future or unpaid invoice(s), subject to the duty on the part of City to mitigate its losses to the extent required by law.

7.4.1 Failing to perform or failing to comply with any required covenant herein;
or

7.4.2 Performing unsatisfactorily as determined by Director.

7.5 Termination By Law. If any state or federal law or regulation is enacted or promulgated which prohibits the performance of any of the duties herein, or, if any law is interpreted to prohibit such performance, this Agreement shall automatically terminate as of the effective date of such prohibition.

7.6 Regardless of how this Agreement is terminated, Consultant shall affect an orderly transfer to City or to such person(s) or firm(s) as the City may designate, at no additional cost to City, all completed or partially completed documents, papers, records,

charts, reports, and any other materials or information produced as a result of or pertaining to the services rendered by Consultant, or provided to Consultant, hereunder, regardless of storage medium, if so requested by City, or shall otherwise be retained by Consultant in accordance with Article VI. Records Retention. Any record transfer shall be completed within 30 calendar days of a written request by City and shall be completed at Consultant's sole cost and expense. Payment of compensation due or to become due to Consultant is conditioned upon delivery of all such documents, if requested.

7.7 Within 45 calendar days of the effective date of completion, termination or expiration of this Agreement, Consultant shall submit to City its claims, in detail, for the monies owed by City for services performed under this Agreement through the effective date of termination. Failure by Consultant to submit its claims within said 45 calendar days shall negate any liability on the part of City and constitute a **Waiver** by Consultant of any and all right or claims to collect moneys that Consultant may rightfully be otherwise entitled to for services performed pursuant to this Agreement.

7.8 Upon the effective date of expiration or termination of this Agreement, Consultant shall cease all operations of work being performed by Consultant or any of its subcontractors pursuant to this Agreement.

7.9 Termination not sole remedy. In no event shall City's action of terminating this Agreement, whether for cause or otherwise, be deemed an election of City's remedies, nor shall such termination limit, in any way, at law or at equity, City's right to seek damages from or otherwise pursue Consultant for any default or other action.

VIII. NOTICE

8.1 Any election, notice or communication required or permitted under this Agreement shall be in writing and deemed received when delivered personally (with receipt acknowledged), or three days after deposit in the U.S. mail, first class, with proper postage prepaid, or upon receipt if by certified mail, return receipt requested, or upon receipt when sent by a commercial courier service) for expedited delivery, at the addresses below. Address for notice may be changed by giving notice to the other Party.

If intended for City, to:

City of San Antonio
Office of Cultural Affairs
P.O. Box 839966
San Antonio, TX 78283-3966

If intended for Consultant, to:

Mikyong Kim Design
119 Braintree Street, Suite 103
Boston, MA 02134

IX. INSURANCE

9.1 Prior to the commencement of any work under this Agreement, Consultant shall furnish copies of all required endorsements and completed Certificate(s) of Insurance to the CITY's Office of Cultural Affairs Department, which shall be clearly labeled "Professional Services Contract Hemisphere" in the Description of Operations block of the Certificate. The Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. The CITY will not accept a Memorandum of Insurance or Binder as proof of insurance. The certificate(s) must have the agent's signature and phone number, and be mailed, with copies of all applicable endorsements, directly from the insurer's authorized representative to the CITY. The CITY shall have no duty to pay or perform under this Agreement until such certificate and endorsements have been received and approved by the CITY's Office of Cultural Affairs. No officer or employee, other than the CITY's Risk Manager, shall have authority to waive this requirement.

9.2 The CITY reserves the right to review the insurance requirements of this Article during the effective period of this Agreement and any extension or renewal hereof and to modify insurance coverages and their limits when deemed necessary and prudent by CITY's Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement. In no instance will CITY allow modification whereby CITY may incur increased risk.

9.3 A CONSULTANT's financial integrity is of interest to the CITY; therefore, subject to CONSULTANT's right to maintain reasonable deductibles in such amounts as are approved by the CITY, CONSULTANT shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at CONSULTANT's sole expense, insurance coverage written on an occurrence basis, unless otherwise indicated, by companies authorized to do business in the State of Texas and with an A.M Best's rating of no less than A- (VII), in the following types and for an amount not less than the amount listed below:

<u>TYPE</u>	<u>AMOUNTS</u>
1. Workers' Compensation	Statutory
2. Employers' Liability	\$500,000/\$500,000/\$500,000
3. Broad Form Commercial General Liability Insurance to include coverage for the following:	For <u>Bodily Injury</u> and <u>Property Damage</u> of \$1,000,000 per occurrence;
a. Premises/Operations	\$2,000,000 General Aggregate, or its equivalent in Umbrella or Excess Liability Coverage
b. Independent Contractors	
c. Products/Completed Operations	
d. Personal Injury	
e. Contractual Liability	
f. Damage to property rented by you	\$100,000

4. Business Automobile Liability a. Owned/leased vehicles b. Non-owned vehicles c. Hired Vehicles	<u>C</u> ombined <u>S</u> ingle <u>L</u> imit for <u>B</u> odily <u>I</u> njury and <u>P</u> roperty <u>D</u> amage of \$1,000,000 per occurrence
5. Professional Liability (Claims-made basis) To be maintained and in effect for no less than two years subsequent to the completion of the professional service.	\$1,000,000 per claim, to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages by reason of any act, malpractice, error, or omission in professional services.

9.4 Consultant agrees to require, by written contract, that all subcontractors providing goods or services hereunder obtain the same insurance coverages required of CONSULTANT herein, and provide a certificate of insurance and endorsement that names the Consultant and the CITY as additional insureds. Respondent shall provide the CITY with said certificate and endorsement prior to the commencement of any work by the subcontractor. This provision may be modified by CITY’s Risk Manager, without subsequent City Council approval, when deemed necessary and prudent, based upon changes in statutory law, court decisions, or circumstances surrounding this agreement. Such modification may be enacted by letter signed by CITY’s Risk Manager, which shall become a part of the contract for all purposes.

9.5 As they apply to the limits required by the CITY, the CITY shall be entitled, upon request and without expense, to receive copies of the policies, declaration page, and all endorsements thereto and may require the deletion, revision, or modification of particular policy terms, conditions, limitations, or exclusions (except where policy provisions are established by law or regulation binding upon either of the Parties or the underwriter of any such policies). CONSULTANT shall be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to CITY at the address provided below within 10 days of the requested change. CONSULTANT shall pay any costs incurred resulting from said changes.

City of San Antonio
Office of Cultural Affairs
Attn: James LeFlore
P.O. Box 839966
San Antonio, Texas 78283-3966

9.6 CONSULTANT agrees that with respect to the above required insurance, all insurance policies are to contain or be endorsed to contain the following provisions:

- Name the CITY, its officers, officials, employees, volunteers, and elected representatives as additional insureds by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under

contract with the CITY, with the exception of the workers' compensation and professional liability policies;

- Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio where the CITY is an additional insured shown on the policy;
- Workers' compensation, employers' liability, general liability and automobile liability policies will provide a waiver of subrogation in favor of the CITY.
- Provide advance written notice directly to CITY of any suspension, cancellation, non-renewal or material change in coverage, and not less than 10 calendar days advance notice for nonpayment of premium.

9.7 Within five calendar days of a suspension, cancellation or non-renewal of coverage, CONSULTANT shall provide a replacement Certificate of Insurance and applicable endorsements to CITY. CITY shall have the option to suspend CONSULTANT's performance should there be a lapse in coverage at any time during this contract. Failure to provide and to maintain the required insurance shall constitute a material breach of this Agreement.

9.8 .In addition to any other remedies the CITY may have upon CONSULTANT's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, the CITY shall have the right to order CONSULTANT to stop work hereunder, and/or withhold any payment(s) which become due to CONSULTANT hereunder until CONAULTANT demonstrates compliance with the requirements hereof.

9.9 Nothing herein contained shall be construed as limiting in any way the extent to which CONSULTANT may be held responsible for payments of damages to persons or property resulting from CONSULTANT's or its subcontractors' performance of the work covered under this Agreement.

9.10 It is agreed that CONSULTANT's insurance shall be deemed primary and non-contributory with respect to any insurance or self insurance carried by the City of San Antonio for liability arising out of operations under this Agreement.

9.11 It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Agreement and that no claim or action by or on behalf of the CITY shall be limited to insurance coverage provided.

9.12 CONSULTANT and any Subcontractors are responsible for all damage to their own equipment and/or property.

X. INDEMNIFICATION

10.1 **CONSULTANT** covenants and agrees to **FULLY INDEMNIFY, DEFEND and HOLD HARMLESS**, the **CITY** and the elected officials, employees, officers, directors, volunteers and representatives of the **CITY**, individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, made upon the **CITY** directly or indirectly arising out of, resulting from or related to **CONSULTANT'S** activities under this **AGREEMENT**, including any acts or omissions of **CONSULTANT**, any agent, officer, director, representative, employee, contractor or subcontractor of **CONSULTANT**, and their respective officers, agents employees, directors and representatives while in the exercise of performance of the rights or duties under this **AGREEMENT**. The indemnity provided for in this paragraph shall not apply to any liability resulting from the sole negligence of **CITY**, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. **IN THE EVENT CONSULTANT AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.**

10.2 The provisions of this **INDEMNIFICATION** are solely for the benefit of the Parties and not intended to create or grant any rights, contractual or otherwise, to any other person or entity.

10.3 **CONSULTANT** shall advise the **CITY** in writing within 3 business days of any claim or demand against the **CITY** or **CONSULTANT** known to **CONSULTANT** related to or arising out of **CONSULTANT'S** activities under this **AGREEMENT**.

10.4 Defense Counsel - City shall have the right to approve defense counsel to be retained by Consultant in fulfilling its obligation hereunder to defend and indemnify City, unless such right is expressly waived by City in writing. Consultant shall retain City approved defense counsel within seven business days of City's written notice that City is invoking its right to indemnification under this Agreement. If Consultant fails to retain Counsel within such time period, City shall have the right to retain defense counsel on its own behalf, and Consultant shall be liable for all costs incurred by City. City shall also have the right, at its option, to be represented by advisory counsel of its own selection and at its own expense, without waiving the foregoing.

10.5 Employee Litigation – In any and all claims against any party indemnified hereunder by any employee of Consultant, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation herein provided shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Consultant or any subcontractor under worker’s compensation or other employee benefit acts.

10.6 Trademarked and Copyrighted Usage Consultant agrees to obtain all necessary licenses and take all other necessary steps to insure that all use of trademarked and/or copyrighted materials in the Project complies with United States and any other applicable trademark and copyright law.

10.7 Trademark and Copyright Indemnification Consultant agrees to indemnify and defend at its own expense City of San Antonio, their officials, agents and employees from any and all liability arising from copyright infringement and/or consequential damages that others may suffer as a result of the use by Consultant or its designee of trademarked and/or copyrighted materials in the Project.

XI. ASSIGNMENT AND SUBCONTRACTING

11.1 Consultant shall supply qualified personnel as may be necessary to complete the work to be performed under this Agreement. Persons retained to perform work pursuant to this Agreement shall be the employees or subcontractors of Consultant. Consultant, its employees or its subcontractors shall perform all necessary work.

11.2 The use of any subcontractor(s) require the prior written approval of Director.

11.3 Any work or services approved for subcontracting hereunder shall be subcontracted only by written contract and, unless specific waiver is granted in writing by the City, shall be subject by its terms to each and every provision of this Agreement. Compliance by subcontractors with this Agreement shall be the responsibility of Consultant. City shall in no event be obligated to any third party, including any subcontractor of Consultant, for performance of services or payment of fees.

11.4 Except as otherwise stated herein, Consultant may not sell, assign, pledge, transfer or convey any interest in this Agreement, nor delegate the performance of any duties hereunder, by transfer, by subcontracting or any other means, without the prior written consent of Director. As a condition of such consent, if such consent is granted, Consultant shall remain liable for completion of the services outlined in this Agreement in the event of default by the successor Consultant, assignee, transferee or subcontractor.

11.5 Any attempt to transfer, pledge or otherwise assign this Agreement without said written approval, shall be void ab initio and shall confer no rights upon any third person. Should Consultant assign, transfer, convey, delegate, or otherwise dispose of any

part of all or any part of its right, title or interest in this Agreement, City may, at its option, cancel this Agreement and all rights, titles and interest of Consultant shall thereupon cease and terminate, in accordance with Article VII. Termination, notwithstanding any other remedy available to City under this Agreement. The violation of this provision by Consultant shall in no event release Consultant from any obligation under the terms of this Agreement, nor shall it relieve or release Consultant from the payment of any damages to City, which City sustains as a result of such violation.

XII. INDEPENDENT CONTRACTOR

12.1 Consultant covenants and agrees that he or she is an independent contractor and not an officer, agent, servant or employee of City; that Consultant shall have exclusive control of and exclusive right to control the details of the work performed hereunder and all persons performing same, and shall be responsible for the acts and omissions of its officers, agents, employees, contractors, subcontractors and consultants; that the doctrine of respondent superior shall not apply as between City and Consultant, its officers, agents, employees, contractors, subcontractors and consultants, and nothing herein shall be construed as creating the relationship of employer-employee, principal-agent, partners or joint venturers between City and Consultant. The parties hereto understand and agree that the City shall not be liable for any claims which may be asserted by any third party occurring in connection with the services to be performed by the Consultant under this Agreement and that the Consultant has no authority to bind the City.

12.2 Nothing in this Agreement, whether express or implied, shall be construed to give any third party any legal or equitable right, remedy or claim under or in respect of this Agreement or any standing or authority to enforce the terms and provisions of this Agreement.

XIII. CONFLICT OF INTEREST

13.1 The Charter of the City of San Antonio and its Ethics Code prohibit a CITY officer or employee, as defined in Section 2-52 of the Ethics Code, from having a financial interest in any contract with the CITY or any CITY agency such as CITY-owned utilities. An officer or employee has a "prohibited financial interest" in a contract with the CITY or in the sale to the CITY of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale:

- (i) a CITY officer or employee;
- (ii) his parent, child or spouse;
- (iii) a business entity in which the officer or employee, or his parent, child or spouse directly or indirectly owns (i) 10% or more of the voting stock or shares of the business entity, or (ii) 10% or more of the fair market value of the business entity; or
- (iv) a business entity in which any individual or entity above listed is a (i) subcontractor on a CITY contract, (ii) a partner, or (iii) a parent or subsidiary business entity.

13.2 Pursuant to the subsection above, Consultant warrants and certifies, and this Agreement is made in reliance thereon, that it, its officers, employees and agents are neither officers nor employees of the City. Consultant further warrants and certifies that it has tendered to the City a Discretionary Contracts Disclosure Statement in compliance with the City's Ethics Code.

XIV. AMENDMENTS

14.1 Except where the terms of this Agreement expressly provide otherwise, any alterations, additions, or deletions to the terms hereof, shall be effected by amendment, in writing, executed by both City and Consultant.

XV. SEVERABILITY

15.1 If any provision of this Agreement is illegal, invalid, or unenforceable under present or future laws such that the legitimate expectations of either Party are incapable of being realized and cannot be reformed to validly and legally meet such thwarted expectations, then, it is the intention of the Parties that this Agreement shall terminate in all respects. In any other event, it is the intention of the Parties that such offending provision is reformed to validly and legally meet such thwarted expectations, and that the remainder of this Agreement will not be affected.

XVI. LICENSES/CERTIFICATIONS

16.1 Consultant warrants and certifies that Consultant and any other person designated to provide services hereunder has the requisite training, license and/or certification to provide said services, and meets all competence standards promulgated by all other authoritative bodies, as applicable to the services provided herein.

XVII. COMPLIANCE

17.1 Consultant shall provide and perform all services required under this Agreement in compliance with all applicable federal, state and local laws, rules and regulations.

XVIII. NONWAIVER OF PERFORMANCE

18.1 Unless otherwise specifically provided for in this Agreement, a waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall not be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification or discharge by either

party hereto of any provision of this Agreement shall be deemed to have been made or shall be effective unless expressed in writing and signed by the parties in accordance with Article XIV. Amendments. No act or omission by a Party shall in any manner impair or prejudice any right, power, privilege, or remedy available to that Party hereunder or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved hereby.

XIX. LAW APPLICABLE & VENUE

19.1 THIS AGREEMENT SHALL BE CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER ARE PERFORMABLE IN BEXAR COUNTY, TEXAS.

19.2 Any legal action or proceeding brought or maintained, directly or indirectly, as a result of this Agreement shall be heard and determined in the City of San Antonio, Bexar County, Texas.

XX. LEGAL AUTHORITY

20.1 The signer of this Agreement for Consultant represents, warrants, assures and guarantees that he has full legal authority to execute this Agreement on behalf of Consultant and to bind Consultant to all of the terms, conditions, provisions and obligations herein contained.

XXI. PARTIES BOUND

21.1 This Agreement shall be binding on and inure to the benefit of the Parties hereto and their respective heirs, executors, administrators, legal representatives, and successors and assigns, except as otherwise expressly provided for herein.

XXII. CAPTIONS

22.1 The captions contained in this Agreement are for convenience of reference only, and in no way limit or enlarge the terms and/or conditions of this Agreement. Any defined term used in the plural shall refer to all members of the relevant class, and any defined term used in the singular shall refer to any number of members of the relevant class. Any reference to this Agreement, or any Exhibits, shall include this Agreement, Exhibits and other documents and agreements as originally executed and as the same may from time to time be supplemented, modified or amended.

XXIII. ENTIRE AGREEMENT

23.1 This Agreement along with Exhibit I Performance Schedule together constitutes the final and entire agreement between the Parties. No other agreements, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or

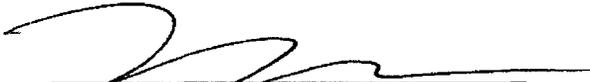
to bind the Parties, unless same be in writing, dated subsequent to the date hereto, and duly executed by the Parties, in accordance with Article XIV. Amendments. Should there be any conflict between this Agreement and any Exhibits, this Agreement shall control.

EXECUTED and **AGREED** to this the _____ day of _____, 2012.

CITY:
CITY OF SAN ANTONIO

CONSULTANT:
Mikyoung Kim Design

Felix Padrón
Executive Director
Office of Cultural Affairs



Mikyoung Kim
Principal

Attest:

City Clerk

Approved as to Form:

City Attorney

EXHIBIT I: Performance Schedule

Phase I: Execution of Agreement by the Parties

Phase II: Project Introduction and Analysis (October- December 2012)

October 2012: Workshop #1: Fact Finding Workshop and Community Meetings/Site visit
Review Existing Art Collection/ Review Hemisfair Park Master Plan
Completion of the following Sections as described in the Agreement:
3.2.1 Initial City Staff and Team Meeting, Guidelines and Process Development;
3.2.2 Research; and
3.2.3 Interviews, Meetings and Presentations.

December 2012: Workshop #2: Analysis Presentation/ Initial Concepts
Submission: Analysis Concept Book

Phase III: 50% Design Development (January- April 2013)

January: Develop Concept Guidelines and Approach. Establish Typology of Art

February- March: Develop Concept Design for Art Master Plan
Submission: Concept Guideline Book

April: Workshop #3: Progress Presentation
Submit: Guideline Book

Phase IV: 100% Design Development: Art Master Plan (May- November 2013)

May- July 2013: Draft Art Master Plan development

1. Refine Conceptual Approach
2. Schedule Coordination
3. Budget Coordination
4. Art Selection Criteria
5. Site Diagram of Art Zones

Phase V: Presentation #5: Final Presentation

Submission: Final Master Plan Book